

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RANDY E. STONE)	
Claimant)	
)	
VS.)	Docket No. 253,844 &
)	1,009,137
K-MART CORPORATION)	
Self-Insured Respondent)	

ORDER

Both claimant and respondent requested review of the June 22, 2004 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on November 30, 2004.

APPEARANCES

Jack L. Heath of Topeka, Kansas, appeared for the claimant. Clifford K. Stubbs of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found the claimant's accidental injuries arose out of and in the course of employment but the claimant did not sustain any permanent partial disability as a result of the two accidents.

The claimant requests review of whether the claimant's disabling chronic pain is the result of his accidental injuries of October 6, and December 30, 1999. Claimant argues he is entitled to a 15 percent permanent partial functional impairment based on Dr. John W. Weigel's rating.

The respondent agrees claimant suffered accidental injury on the dates alleged but argues the objective medical evidence does not explain or corroborate claimant's continued pain complaints. Respondent further argues the surveillance of claimant contradicted his professed inability to engage in physical activities because of excruciating pain. Accordingly, respondent requests the Board to affirm the ALJ's finding claimant failed to meet his burden of proof that he suffered permanent impairment as a result of the two accidental injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

On October 6, 1999, the claimant experienced severe pain in his left groin while pulling on a loaded floor jack. The claimant developed swelling in his left testicle and sought treatment. A sonogram revealed enlargement of the left epididymitis with increasing vascularity comparable to acute left epididymitis. Claimant was provided treatment but continued to have pain complaints. Eventually, claimant returned to light-duty work.

On December 30, 1999, the claimant was pulling the floor jack loaded with boxes of rubber trash cans. Claimant experienced severe pain in his right testicle which he described as identical to the pain he had suffered in the October 6, 1999 incident.

Claimant was provided extensive treatment from his personal physician as well as several urologists. Claimant was provided conservative treatment consisting of a variety of pain medications and ultimately underwent a surgical denervation of the right testicle. The pain complaints continued and at regular hearing the claimant testified that he was taking 16 different medications, including Vioxx, Celebrex, Skelaxin, Methadone, Duragesic patches, Percocet, Effexor, Celexa, and Neurontin.

The dispositive issue is whether claimant suffered any permanent impairment as a result of the two accidents. The ALJ concluded claimant had failed to meet his burden of proof that he suffered any permanent impairment and the Board agrees.

The claimant consistently testified he suffered from debilitating pain which prevented him from engaging in physical activities. When claimant presented for examination with

the various physicians he exhibited pain behavior when touched, had a tentative wide straddled gait, and demonstrated pain with almost any movement. However, surveillance videotape showed claimant engaging in physical activities without the tentative gait the doctors noted and without any indication of pain when stooping, bending and squatting. Additional surveillance was conducted which revealed claimant engaging in bartending and even physically removing his inebriated angry brother from the bar. Again, all the physical activities performed contradicted claimant's professed inability to engage in physical activity due to excruciating pain.

As noted by the ALJ, the physicians were unable to find an objective medical reason for claimant's continued complaints of pain. Ultimately, the claimant was examined by Dr. James S. Zarr, board certified in physical medicine and rehabilitation. The physical examination of claimant did not reveal any objective findings. The doctor testified:

Q. And when you say it doesn't make physiologic sense, can you elaborate further or explain further what you mean by that?

A. The probable causes didn't have any findings on physical exam to support any of those diagnoses.

Q. When you say any of those diagnoses, what do you mean?

A. Well, if there was inflammation of the epididymis, there would be redness, warmth, swelling, inflammation, hallmarks. Likewise, if there was reflex sympathetic dystrophy, you would get a lot of redness, warmth and swelling. You can get -- after a long period of time, you can get atrophy of the involved body part, which is wasting away of it, but everything appeared normal on him except for his subjective complaints of pain.¹

The doctor further noted that upon examination the claimant demonstrated pain behavior with grimacing and difficulty moving. However, after review of the surveillance videotape the doctor concluded claimant was misrepresenting or concealing his true condition and true abilities. Finally, Dr. Zarr opined claimant had no permanent impairment and needs no restrictions.

Dr. John W. Weigel noted that when the claimant presented for examination he had an unusual straddle, wide-based gait while walking and noted claimant was pretty immobilized by his condition. Again, neither the videotape nor the testimony of the investigator who conducted additional surveillance of claimant revealed claimant walking in the fashion he presented to Dr. Weigel.

¹ Zarr Depo. at 11.

The ALJ determined the condition that arose after the injuries had been treated and from the medical record had resolved. The ALJ further noted there was either no explanation for claimant's pain or that claimant is feigning his symptoms and, in either case, the claimant failed to meet his burden of proof to establish he suffered a permanent disability.

As Dr. Zarr concluded, if the claimant's subjective complaints of pain are not credible then he suffers no permanent impairment. The Board finds Dr. Zarr's analysis persuasive and affirms the ALJ's Award.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated June 22, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jack L. Heath, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director